In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1053

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In June 1963, following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of interfering with commerce by extortion, in violation of 18 U.S.C. 1951. He was sentenced to seven years' imprisonment and to pay a fine of $10,000. The conviction was affirmed (334 F. 2d 678), and a petition for a writ of certiorari was denied by this Court on December 14, 1964 (379 U.S. 947).

On January 4, 1965, petitioner filed in the district court a motion for a new trial on the ground of alleged newly discovered evidence that one of the jurors at his trial, Stephen Cassidy, had, prior to the trial, harbored and expressed strong feelings of prej-

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udice against petitioner which he failed to disclose during the *voir dire* examination (R. 4a, 55a–56a). District Judge Shaw, who had presided at the original trial, conducted an evidentiary hearing during which witnesses were presented and cross-examined by petitioner and by the government.

Thereafter, in an extensive opinion (240 F. Supp. 393; R. 624a–667a), the district judge denied the motion. He found from all the evidence, including the demeanor of the witnesses, that the two principal witnesses who testified that Cassidy had made remarks indicating prejudice on his part were personally interested in obtaining reversal of petitioner's conviction and that they could not be believed in the absence of corroborative evidence (R. 630a–639a, 656a–657a). The court observed that witnesses called by the government testified that they had never heard Cassidy make statements of the sort attributed to him although they were said by petitioner's witnesses to have been present on some of the 350 occasions when Cassidy allegedly made "impassioned, loud, heated and intemperate characterizations" of petitioner (R. 639a–640a). The court also noted that other persons who were said to have been present were never called to testify by petitioner (R. 640a). Reviewing the corroborating evidence in detail, the court concluded that it was "at best, minimal. It was not consistent and in some instances was obviously incredible. In other instances, it was refuted by evidence of more convincing and persuasive quality" (R. 656a). The court consequently found the proof insufficient to

sustain the allegation that Cassidy was prejudiced (R. 657a). It also rejected, on the evidence, the claim that Cassidy had concealed any material fact during the *voir dire* of the jury (R. 661a). The court of appeals affirmed *per curiam* "for the reasons so well stated by Judge Shaw in his Opinion * * *" (Pet. App. 1a; 353 F. 2d 1011).

This case obviously presents no issue warranting review by this Court. The district judge concluded, after hearing the testimony, that the petitioner's two principal witnesses could not be believed unless there was convincing corroboration for their testimony. In reaching this conclusion the court considered the witnesses' demeanor and their interest in petitioner's case, together with such corroboration as was presented. The court's factual conclusion is buttressed by the improbability that a juror with the publicly declared views which Cassidy allegedly expressed on many occasions to one witness who was a loyal friend and associate of petitioner's could have continued to serve during petitioner's two-and-a-half-week trial without knowledge of Cassidy's opinions coming to petitioner's attention. There is no occasion whatever for this Court to re-examine the district judge's findings (Pet. 36–41).

Petitioner's other contentions are plainly unsound. The district court correctly found that the juror had not concealed "any material fact on the *voir dire*" (R. 661a). The two specific instances cited by petitioner (Pet. 24–25) do not affect the validity of this conclusion. There was no evidence to corroborate the

testimony of one of petitioner's two principal witnesses—whom the judge refused to credit in the absence of corroboration (R. 656a)—that the juror harbored a personal grievance against petitioner because the Teamsters Union had withdrawn its cooperation in a strike called by the United Automobile Workers.[1] Nor did the evidence establish that the juror had concealed the fact that he had been exposed to publicity regarding petitioner. The district judge—who had also presided at the trial—noted that the court reporter had not been in a position to see all those who raised their hands when they were asked if they had heard of petitioner (R. 660a). And, as the court observed, the same facts from which petitioner now infers that the juror must have had knowledge of unfavorable publicity regarding petitioner—*i.e.*, that he was an officer of a United Automobile Workers local union—were known to petitioner at the time of the

[1] The statements made to the F.B.I. by government witnesses McConnell and DeMarco were not relevantly corroborative of Bladen (petitioner's witness), as petitioner argues (Pet. 24, 41). McConnell told the F.B.I. that there had been "considerable discussion" at the Ford plant during the strike "concerning the fact that the members of the International Brotherhood of Teamsters (IBT) were 'crossing' the UAW picket lines." He added, however, that the discussion "was limited to the relative abilities of" Walter Reuther and James Hoffa as labor leaders (Ex. G-1, R. 622a; R. 517a–518a). DeMarco said that Cassidy and Bladen were in disagreement over the fact that members of the Teamsters Union were crossing the U.A.W. picket lines and that Cassidy "did not think that this was proper procedure for the IBT" (Ex. G-9, R. 623a; R. 512a). The latter statement was hardly indicative of a feeling of group bias against the Teamsters of a kind requiring disclosure a year and a half later.

voir dire, when he failed to challenge the juror peremptorily (R. 661a).

There is also no substance to the claim that the district court committed error when it refused to require the government to call the juror as a witness (Pet. 28–32). Although there are circumstances under which it might be appropriate to permit a juror to testify on a motion for a new trial (see *Mattox* v. *United States,* 146 U.S. 140, 147–149; *Remmer* v. *United States,* 350 U.S. 377), this was not such a case. As the Court of Appeals for the Third Circuit observed in *United States ex rel. Daverse* v. *Hohn,* 198 F. 2d 934, 938–939, certiorari denied, 344 U.S. 913:

> In the interest of encouraging citizens to serve on juries without fear of later disparaging inquiries into their lives and personal habits we state that the answers given by a juror under oath on the *voir dire* should not be challenged through subsequent questioning of that juror except under exceptional circumstances. * * *

See also *United States* v. *Chereton,* 309 F. 2d 197, 201 (C.A. 6), certiorari denied, 372 U.S. 936; *Medina* v. *United States,* 254 F. 2d 228, 231 (C.A. 9), certiorari denied, 358 U.S. 846; *United States* v. *Nystrom,* 116 F. Supp. 771, 777 (W.D. Pa.), affirmed, 237 F. 2d 218 (C.A. 3); *State* v. *LaFera,* 42 N.J. 97, 105–108.

The only real issue on petitioner's motion for a new trial, as petitioner's counsel conceded (R. 25b–26b, 52b–53b), was an issue of credibility, and, in the absence of corroborative evidence, the district court dis-

believed petitioner's witnesses. The court's finding did not rest, as petitioner contends, on an adverse inference based upon his failure to call additional witnesses (Pet. 32–34); the principal ground of decision was that the evidence was insufficient to sustain petitioner's factual assertion. Finally, the claim made by petitioner in his motion for a new trial was that the juror had harbored and expressed hostility to petitioner personally, not to the local or international unions of which he was an officer (R. 4a). Consequently, it is not surprising that the district court's findings were directed to the question whether the juror was prejudiced against petitioner individually, not whether he manifested bias against the Teamsters Union (Pet. 34–36). In any event, there is no basis in the record for assuming that the juror's opinions regarding the union influenced his ability impartially to weigh the evidence regarding petitioner's guilt or innocence, and the court specifically found that no facts had been developed from which it could reasonably infer "the existence of any preconceived prejudice in Mr. Cassidy's mind which would impel him to vote for a conviction on any basis other than fair and impartial consideration of the evidence adduced at trial * * *" (R. 657a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966